

APOLLO ENERGY, INC.

IBLA 85-492

Decided October 23, 1986

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, affirming assessment of liquidated damages for incidents of noncompliance. NM-22636, et al.

Affirmed in part, vacated in part.

1. Evidence: Presumptions--Oil and Gas Leases: Civil Assessments and Penalties

BLM may properly issue a notice of incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations with respect to an oil and gas lease, where that document is not in the record and the presumption that BLM did not lose or misplace it has not been rebutted.

2. Oil and Gas Leases: Civil Assessments and Penalties-- Regulations: Generally

An assessment of liquidated damages for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

APPEARANCES: M. Y. Merchant, President, Apollo Energy, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Apollo Energy, Inc., has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated February 1, 1985, affirming the assessment of liquidated damages for incidents of noncompliance with respect to nine oil and gas leases. 1/

1/ This case involves the following nine leases: NM-22636, NM-155254-A, NM-155494, NM-155494-A, NM-177517, NM-254700, NM-276225, NM-354427-A, and NM-444628.

On December 21, 1984, the Roswell Resource Area Office, New Mexico, BLM, issued nine notices of incident of noncompliance (INC) to appellant for failure to submit a report of operations (Form 3160-6) "for the month of June 1984," as required by 43 CFR 3162.4-3, with respect to each of the nine oil and gas leases identified by lease number in note 1. The INC's each stated that appellant was "assessed \$100 for failure to comply pursuant to [43] CFR 3163.3(h)," and required compliance within 30 days.

By letter dated December 26, 1984, appellant stated it was enclosing "copies of Monthly Report of Production for June, 1984" and requested the \$100 assessments be "cancelled." The nine monthly reports, thus, were apparently received by BLM on December 28, 1984, at the time it received the letter. In a January 8, 1985, letter, appellant explained: "Our Federal Reports are always out of our office by the 10th of the month following the completion of the C-115. It is our feeling that this month of June, 1984 in question was not received through the mail or something of that nature."

BLM treated appellant's letters as a request for a technical and procedural review pursuant to 43 CFR 3165.3. In its February 1985 decision, BLM affirmed the assessments because while it could not "deny that the Forms were mailed * * * they were never received by our Roswell office."

In its statement of reasons for appeal, appellant contends the monthly reports must have been misplaced by the Postal Service or BLM when they were mailed to BLM:

All monthly reports are mailed the same time to the State of New Mexico as well as to the Federal Departments. The State along with other departments received their reports and APOLLO has a copy in its files. There is no reason to believe that June, 1984 reports were skipped when we have filed each and every report over the past two and one half (2-1/2) years of operations.

[1] The applicable regulation, 43 CFR 3162.4-3, requires a monthly report of operations be "filed" with the authorized BLM officer "on or before the 10th day of the second month following the production month," unless an extension has been granted by the authorized officer. The requirement commences with the month "in which drilling operations are initiated" and continues "until the lease is terminated or until omission of the report is authorized." Id.

Appellant does not challenge BLM's conclusion that prior to December 1984 the file pertaining to its lease did not contain the nine required monthly reports of operations for June 1984. Rather, appellant asserts it mailed the required documents to BLM and they were either lost by the Postal Service and never received by BLM or received by BLM but then lost.

A document is deemed to be filed with BLM when "it is received in the proper office." 43 CFR 1821.2-2(f). We have long held that a party choosing the Postal Service as the means of delivery of a required document must bear the consequences of loss or untimely delivery of the document. Paul E. Hammond, 87 IBLA 139 (1985), and cases cited therein. Thus, depositing a

document in the mails does not constitute filing under Departmental regulations. Anthony J. Perchetti, 89 IBLA 320 (1985). Appellant's noncompliance is not excused by any action or inaction on the part of the Postal Service.

With respect to the contention that the document may have been lost by BLM, there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. Gonzales v. Ross, 120 U.S. 605, 623 (1887); Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); Phillips Petroleum Co., 38 IBLA 344 (1978). Thus, it is presumed that BLM employees have properly discharged their duties and not lost or misplaced a document. Thorvald W. Hansen, 90 IBLA 159 (1985). This presumption may be rebutted by convincing and uncontradicted evidence "which clearly and distinctly establishes a fact, so that reasonable minds can draw but one inference." John Walter Starks, 55 IBLA 266, 270 (1981), appeal dismissed, Starks v. Watt, Civ. No. 81-0711 (C.D. Utah, Mar. 2, 1982); see Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985). However, an uncorroborated statement that a document was mailed to and received by BLM will not suffice to overcome the presumption that the document was not filed with BLM. Thorvald W. Hansen, *supra*.

In the present case, appellant only asserts that the monthly reports for the month of June 1984 were mailed to BLM and offers no proof the nine documents were received by BLM. 2/ We, therefore, conclude appellant has not established that BLM received the documents but then lost or misplaced them. See Norman A. Whittaker, 89 IBLA 224 (1985). In the absence of timely submission of the required monthly reports, we conclude BLM properly issued the INC's in accordance with 43 CFR 3162.4-3. See Somont Oil Co., Inc., 91 IBLA 137 (1986).

[2] The only remaining question is whether appellant was properly assessed \$100 for each INC pursuant to 43 CFR 3163.3(h). Under 43 CFR 3163.1, BLM is authorized to assess liquidated damages for specific instances of noncompliance. In the case of "failure to * * * file required reports * * * as required by the regulations in this part [43 CFR Part 3160]," BLM is authorized to assess liquidated damages in the amount of \$100 with respect to each INC.

On March 22, 1985, by notice published in the Federal Register, BLM suspended the use of assessments for noncompliance levied pursuant to 43 CFR 3163.3(h), except where actual loss or damage can be ascertained. 50 FR 11517-18 (Mar. 22, 1985); see BLM Instruction Memoranda Nos. 84-594, Change 4, and 85-384, dated April 16, 1985. Despite this suspension, the Board would normally apply the regulation in effect at the time of the noncompliance. Yates Energy Corp., 89 IBLA 150, 153 n.1 (1985). However, on

2/ Appellant, however, states on appeal that 14 monthly reports would have been mailed to BLM, but only nine INC's were issued. This suggests that the nine monthly reports involved herein were included with five other reports which were received by BLM, and, therefore, the nine reports must have been lost or misplaced by BLM. Even if the five reports were filed with BLM, this evidence would not overcome the presumption that the nine reports were not received by BLM. See Cascade Energy & Metals Corp., 87 IBLA 113 (1985).

January 30, 1986, BLM also published proposed rules in the Federal Register entirely eliminating the automatic assessment of liquidated damages for failure to file monthly reports of operations in a timely manner under 43 CFR 3163.3(h). See 51 FR 3882 (Jan. 30, 1986). Under the proposed rules, BLM would be required to notify a lessee that it had failed to file a monthly report and to provide a specified time for compliance before it could levy an assessment. See 43 CFR 3163.3(b)(1) (51 FR 3890 (Jan. 30, 1986)).

In Somont Oil Co., supra, we vacated a BLM decision to assess liquidated damages for failure to file a monthly report of operations, because 43 CFR 3163.3(h) had been suspended in favor of proposed rules which evidence a change in the Department's discretionary assessment policy and there were no countervailing regulations, public policy reasons or intervening rights which would preclude the invocation of that changed policy. The same rationale is applicable to this matter. Accordingly, we vacate the BLM decision to the extent it levied assessments pursuant to 43 CFR 3163.3(h).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and vacated in part.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

John H. Kelly
Administrative Judge

